No. 07-495

IN THE

Supreme Court of the United States

LAVONNA EDDY AND KATHY LANDER,
Petitioners,

v.

WAFFLE HOUSE, INCORPORATED, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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The court of appeals in this case concluded that, notwithstanding that petitioners were not parties to the trial or the jury's verdict, they are precluded from litigating an issue because the jury resolved that issue against someone else (Mark Lander). In reaching that conclusion, the court of appeals joined several courts of appeals that have broadly permitted preclusion of nonparties without any of the factors, such as manipulation or control by the nonparty or the existence of a representative relationship, that have traditionally justified a finding of "privity" between nonparty and party. See Pet. 17-19. Other courts of appeals, however, have rejected such preclusion of nonparties. Pet. 13-17. This case squarely

presents the question whether the expansive view should be adopted, especially in light of this Court's repeated reminders that a judgment "among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to the proceeding." *Martin v. Wilks*, 490 U.S. 755, 762 (1940). Further review is warranted.

I. THERE IS A CONFLICT IN THE CIRCUITS

Respondent contends (Br. in Opp. 6) that there is no conflict in the circuits on the issue in this case, because the court of appeals' general statement of a five-part test for applying collateral estoppel is not contested. This case, however, does not present the question whether the five-part test cited by the court of appeals is correct. The question presented concerns only the fifth of those factors: whether a nonparty to a previous case can be said to have had "a full opportunity to litigate the issue [on which preclusion is sought] in the previous forum," Pet. App. 9a, in the absence of manipulative conduct or control, representative status, or a close legal relationship with a party. This case squarely poses that question, which has divided the courts of appeals.

1. As explained in the Petition (at 13-17), under the traditional view, accepted and reaffirmed in decisions of the First, Fifth, Seventh, and Eleventh Circuits, a nonparty cannot be bound unless it either engaged in manipulative conduct or control, or had a representative or other similar close legal relationship with a party to the prior case. Under the opposing line of authority, often referred to as the "virtual representation" doctrine, a nonparty to the prior case can be bound merely because a party to that case had similar interests to the nonparty and

litigated the same or a similar issue and lost. See Pet. 17-19.[1] Under that line of cases, the nonparty may be bound by a judgment even in the absence of any of the factors—manipulative conduct or control by the nonparty, etc.—that have in the past been essential to a finding of "privity" that warrants preclusion of the nonparty.

The courts of appeals have expressly recognized the existence of the conflict. As early as 1996, the Eighth Circuit noted that "[s]ome courts permit a wide use of virtual representation," while "[o]ther courts would permit a nonparty to be bound by a prior judgment under a theory of virtual representation only in very limited, technical situations." *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996), cert. denied, 520 U.S. 1166 (1997). While the Eighth Circuit "[a]gree[s] with those courts that give wider use to virtual representation," *Tyus*, 93 F.3d at 455, the Seventh Circuit has noted that "[v]itual representation" is "a doctrine we *disapproved* in *Tice v. American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998), [cert. denied, 517 U.S. 1036 (1999).]" *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 333 F.3d 763, 769 (7th Cir. 2003) (emphasis added). The Seventh Cir-

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[1] Although respondent quibbles (Br. in Opp. 7, 12, 15) with our use of the term "virtual representation," nothing hinges on that term. The question presented is whether nonparties may be precluded, in the absence of manipulation or control, a representative relationship, or another similar close legal relationship warranting a finding of privity, merely because the party had interests sufficiently similar to those of the nonparty. We, and a number of courts and commentators on both sides of the issue, have used the term "virtual representation" as shorthand for the proposition that they may. See, *e.g.*, *Tice v. American Airlines, Inc.*, 162 F.3d 966, 970 (7th Cir.) (discussing origins of term), cert. denied, 527 U.S. 1036 (1999).

cuit has expressly repeated its disapproval. See *DeBraska v. City of Milwaukee*, 189 F.3d 650, 653 (7th Cir. 1999) (referring to "this circuit's dim view of preclusion by virtual representation"); *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77 (2d Cir. 2005) (noting that Second Circuit "has endorsed" the "so-called doctrine of 'virtual representation,'" although it "is controversial . . . and the Seventh Circuit has sharply criticized it"). Just this year, the D.C. Circuit noted that "other circuits vary widely in their approach to the doctrine" of virtual representation." *Taylor v. Blakey*, 490 F.3d 965, 971 (D.C. Cir. 2007); see *id.* at 974 (contrasting its own approach with that of First and Seventh Circuits).

2. Respondent does not dispute that the circuits are divided on whether a mere finding of "virtual representation" is sufficient to bind a nonparty to the results of litigation. Instead, respondent contends (Br. in Opp. 13-15, 21-22) that the decision in this case was controlled by the court of appeals' earlier ruling in *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974).[2] If respondent were correct that *Street* controlled the decision in this case, but see Pet. 21-22 & n.9, it would show only that the broad nonparty preclusion theory in this case is further embedded in Fourth Circuit case law. That would provide an additional reason why this Court's review to consider this troubling expansion of the law of preclusion is warranted.[3]

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[2] Respondent no longer attempts to defend the court of appeals' reliance on *Jackson v. Hayakawa*, 605 F.2d 1121 (9th Cir. 1979). See Pet. 22-23 (discussing *Jackson*); Pet. App. 10a-11a.

[3] It is puzzling why respondent would assert (Br. in Opp. 21-22) that the Petition introduces something new in arguing "the facts in *Street* concerned only 'uncontroverted' facts whereas the

II. THIS CASE SQUARELY PRESENTS THE ISSUE ON WHICH THE CIRCUITS ARE DIVIDED

This case squarely presents the question whether a nonparty may be precluded by a court's resolution of an issue, where the nonparty has engaged in no manipulative conduct or control of the litigation and has no representative or other similar legal relationship with a party that would traditionally justify preclusion. Far from engaging in manipulation or similar conduct to avoid involvement, petitioners did all that they could to remain parties in this case. But once respondent had successfully obtained summary judgment against petitioners prior to trial, their status as parties to the further proceedings on the merits ceased. See Pet. 11 & n.1. Petitioners were thus *not* parties to the litigation and resolution of the issue—whether Mark Lander was denied service at the Waffle House on account of his race—that the court of appeals held they were estopped from litigating. There is no ambiguity in (a) the fact that petitioners were *not* parties to the trial or verdict in this case, (b) the fact that petitioners engaged in no manipulative conduct or control and had no legal relationship with Mark Lander such that they were bound by his litigation conduct, and (c) the court of appeals' holding that petitioners were collaterally estopped from litigating issues that were resolved *only* by the trial and verdict. The legal

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facts in the instant case are controverted." Petitioners' reply brief in the court of appeals quoted the *Street* court's statement that it was relying on "uncontroverted evidence," see 492 F.2d at 375, and made the same argument made in the Petition (at 21-22). See Pet'r Corrected C.A. Reply Br. 6.

question whether a nonparty may be precluded in such circumstances is thus squarely presented.

1. Respondent repeatedly refers to petitioners' role as parties *before* summary judgment was granted and argues that the issue of nonparty preclusion therefore does not arise because petitioners were not "true non-parties." Br. in Opp. 8. See also, *e.g.*, Br. in Opp. 12 (petitioners filed claims, gave deposition testimony, participated in discovery, filed pleadings).

Respondent's claim that petitioners were not "true non-parties" is wrong. Petitioners were nonparties in the only sense relevant here, *i.e.*, they were not parties to the litigation or resolution of the issues that they are now being precluded from litigating. The fact that petitioners were parties earlier in the case is of no consequence. Respondent sought, successfully, to obtain the advantages of eliminating petitioners from this case at the summary judgment stage. The cost of that success, however, was that petitioners were not parties to respondent's victory at trial against Mark Lander. Respondent cannot have it both ways, successfully eliminating petitioners as parties to the trial and then arguing that petitioners are nonetheless bound by the jury's verdict rendered in their absence.

2. Respondent also errs in contending (Br. in Opp. 12, 14, 19) that petitioners' status as witnesses at trial warrants the conclusion that they should be treated as parties. The difference between a party and a witness is precisely the difference between someone who is bound by a court's resolution of an issue and someone who is not. The fact that a nonparty testifies at a trial does not bind the nonparty to the court's resolution of the various issues in the case. See, *e.g.*, *Gonzalez v. Banco Central Corp.*,

27 F.3d 751, 759 (1st Cir. 1994); *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174-1175 (5th Cir. 1987); *Ponderosa Devel. Corp. v. Bjordahl*, 787 F.2d 533, 536-537 (10th Cir. 1986).

Indeed, petitioners' status as *non*parties is illustrated by the treatment of Lavonna Eddy. After summary judgment was granted against her, the parties litigated whether Lavonna Eddy was required to attend the trial. Respondent argued that "she is a party to this litigation." C.A. App. 1045A. Ms. Eddy's attorney argued, to the contrary, that "[t]he action's already been dismissed" as to her. *Id.* at 1046A; see *id.* at 1047A ("I don't think that the fact that historically, because she *was* a party, at this point where she does not stand to benefit from the litigation, she can be or should be compelled to appear.") (emphasis added). The court observed that Ms. Eddy "was a party to this litigation *until I threw her out of court, at [respondent's] request.*" *Id.* at 1045A (emphasis added). The court thus refused to require her to appear, stating that "I don't see any difference between Miss Eddy and a witness." *Id.* at 1050A.

III. THE COURT OF APPEALS' RULING DEPARTS FROM CORE PRINCIPLES OF PRECLUSION LAW THAT REFLECT SERIOUS DUE PROCESS AND SEVENTH AMENDMENT CONCERNS

A nonparty may not be precluded from litigating an issue merely because a party has litigated that issue and lost, regardless of the "adequacy," Br. in Opp. 23, of the party's conduct of the litigation. The court of appeals' decision departs from that sound rule, and it thereby threatens core due process and Seventh Amendment principles.

1. Respondent argues (Br. in Opp. 19) that "considerations of efficiency and finality" justify the court of appeals' broad expansion of preclusion law. Neither of the cases cited by respondent, however, support that proposition. In *Montana v. United States*, 440 U.S. 147, 154 (1979), this Court held that the government was barred by the results of an earlier case, because the government, though not a party, "exercised control over the earlier litigation" involving a government contractor and "plainly had a sufficient 'laboring oar' in the conduct of the [earlier] litigation to actuate principles of estoppel." In that context, the Court noted that interests in efficiency and finality "are . . . implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." *Id.* at 154. In this case, however, petitioners did not control the trial on the merits, and they had no "direct financial or proprietary interest" in the trial court's resolution of Mark Lander's claim. *Montana* is therefore inapposite.[4]

2. As a matter of the law of preclusion alone, respondent's theory would upset the litigation proc-

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[4] *Arizona v. California*, 460 U.S. 605, 619 (1983), also cited by respondent (Br. in Opp. 20) is similarly inapposite. In *Arizona*, the Court held that certain Indian tribes, which were not parties to earlier litigation involving the United States, were nonetheless bound by its outcome. The Court based that conclusion on the fact that, "[a]s a fiduciary, the United States had full authority to bring the [earlier] litigation for the Indians and bind them in that litigation." *Id.* at 626-627. Cf. *Richards*, 517 U.S. at 798; Restatement (Second) of Judgments § 41 (1980). *Arizona* does not suggest or imply that judicial resolution of an issue is binding on a nonparty where, as here, the party to the earlier litigation had no such fiduciary relationship or authority to bind the nonparty.

ess, giving a powerful new weapon to defendants. Defendants seeking to obtain the dismissal of some parties from a case have always had to factor in the consequence that the dismissed parties would not be bound by a judgment favorable to the defendant. Respondent's view, however, rests on the proposition that parties against whom summary judgment is granted *can* be bound by the results of the ensuing litigation among the remaining parties. That would give a new "heads-I-win, tails-you-lose" option to defendants. For that reason alone, respondent's view should be rejected.

3. The right of every person to a day in court, regardless of previous litigation by others, is based not merely on considerations unique to the law of preclusion, but also on deeper considerations of due process and the right to trial by jury. See, *e.g.*, *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) ("There are clearly constitutional limits on the 'privity' exception."). As the Petition explains (at 23-25), principles of due process and the right to a jury trial forbid using a mistaken grant of summary judgment to deprive petitioners of their right to a day in court and, more particularly, a jury trial. This Court's early decisions recognizing and upholding summary judgment as a permissible procedural innovation rest on the proposition that parties against whom a district court grants summary judgment have had all the procedural rights to which they are entitled. If the grant of summary judgment is correct, the parties have had their full day in court. If the grant of summary judgment is incorrect, the additional procedures (including trial by jury) to which the parties are entitled will be granted upon correction of the error on appeal.

The constitutional principles that underlie the law of preclusion would be offended by adopting respondent's view. Under respondent's theory, had petitioners brought their claims separately from Mark Lander, they would have been entitled to a full trial on the merits. But because they brought their claims together with his and then had summary judgment mistakenly granted against them, they are precluded from litigating their own claims. The rights to due process of law and to a jury trial do not permit the law of preclusion to be extended in that way, with the procedural mechanism of summary judgment being employed to deprive nonparties of fundamental procedural rights.

Respondent argues (Br. in Opp. 23) that petitioners' Seventh Amendment arguments "are new and should not be considered." There is no independent Seventh Amendment claim in this case, however. Instead, our argument is that the preclusion rule employed by the court of appeals in this case is barred not only by settled principles of the law of preclusion and sound judicial procedure, but also by the same constitutional principles, based on due process and the right to a jury trial, that have always shaped and guided the law of preclusion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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